IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

RAMON MARTIN FIALLO, An infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, An infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

Appellants,

- against -

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, Jr., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, Jr., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of a divided three-judge Federal Court in the Eastern District of New York, entered on December 1, 1975, which dismissed this action and upheld the constitutional validity under the Fifth Amendment to the United States Constitution of Immigration and Nationality Act §101 (b)(1) and (2) (8 U.S.C.§1101 (b)(1) and (2)), insofar as those provisions denied appellants, United States citizens and permanent residents and their alien fathers or children, the status of "child" and "parent" and concomitant statutory rights under the immigration law, solely because they are illegitimate children or their unwed fathers. Appellants submit this Statement to show that this Court has jurisdiction of the appeal and that substantial federal questions are presented which require plenary review.

OPINIONS BELOW

The majority opinion (Moore, C.J., and Bramwell, D.J.) and the dissenting opinion (Weinstein, D.J.) of the divided three-judge court in the United States District Court for the Eastern District of New York, and the opinion of the single District Judge (Weinstein, D.J.) convening the three-judge court, are not yet reported. They are attached hereto as Appendices A, B, and C, respectively.

JURISDICTION

This action was commenced by plaintiffs as a class action in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. §1361, 8 U.S.C. §1329, the Administrative Procedure Act (5 U.S.C. §701 et seq.), 28 U.S.C. §1331, and 28 U.S.C.§§2201 and 2202, to declare

unconstitutional and enjoin the operation and enforcement of Immigration and Nationality Act §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)), alone and as incorporated into Immigration and Nationality Act §§201(b) (8 U.S.C.§ 1151(b)) and 212(a)(14) (8 U.S.C. §1182(a)(14)), insofar as those provisions unconstitutionally deny United States citizens and permanent residents and their alien fathers or children the status of "parent" and "child" and thereby deny them concomitant statutory rights under the immigration law, solely because they are either illegitimate children or their natural fathers. In an opinion filed January 23, 1975 District Judge Weinstein found the constitutional questions presented by this action to be so substantial as to require the convening of a three-judge court pursuant to 28 U.S.C. §§2282 and 2284. On November 28, 1975 a divided three-judge court filed opinions in which the majority, finding that the plaintiffs had standing to maintain this action, that subject-matter jurisdiction was conferred by 8 U.S.C. §1329, but that plaintiffs' constitutional claims were without merit, denied plaintiffs' motion for summary judgment, permanent injunction, and class action certification, granted judgment for defendants, and dismissed the action. The judgment, attached hereto as Appendix D, was entered on December 1, 1975. On December 31, 1975, appellants filed a notice of appeal to this Court, attached hereto with the affidavit of service as Appendix E. The

jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U.S.C. §1253.

STATUTES INVOLVED

This case involves the constitutional validity of Immigration and Nationality Act §101(b)(1) and(2) (8 U.S.C. §1101(b)(1) and (2)) (66 Stat. 171 (1952), as amended by 71 Stat. 639 (1957), as amended by 89 Stat. 824 (1975)), alone and as incorporated into Immigration and Nationality Act §201(b) (8 U.S.C. §1151(b)) (79 Stat. 911 (1965)) and Immigration and Nationality Act §212(a)(14) (8 U.S.C. §1182(a)(14)) (79 Stat. 917-918 (1965)). The verbatim text of these statutes is set forth in Appendix F.

QUESTION PRESENTED

Whether the Immigration and Nationality Act §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)), alone and as incorporated into Immigration and Nationality Act §§201(b)(8 U.S.C. §1151(b)) and 212(a)(14) (8 U.S.C. §1182(a)(14)), unconstitutionally discriminates against appellants on the basis of sex and illegitimacy, enacts an unconstitutional conclusive presumption, and impermissibly burdens appellants' fundamental interest in the parent-child relationship, in violation of the First, Fifth, and Ninth Amendments to the United States

Constitution, by denying to United States citizens and permanent residents and their alien fathers or children, solely because they are illegitimate children or their natural unmarried fathers, the status , or any opportunity to achieve the status, of "parent" and "child" under the immigration law, and thereby denying them concomitant statutory rights to live together in this country.

STATEMENT

A United States citizen cannot bring his alien relative into the United States as a legal permanent resident unless the alien satisfies or is exempted from the restrictive numerical quota and labor certification requirements. Without exemption from or preference status under the numerical quota system, an Eastern Hemisphere alien can apply for entry only if a quota number remains after initial allotment of the numbers to aliens in preference categories.[1] Even if a quota number is available the alien must further obtain a labor certification. A Western Hemisphere alien cannot enter this country as a legal permanent resident without meeting a general Western Hemisphere numerical quota and obtaining a labor certification. A labor certification is not given at all for a great number of jobs, and for those for which the certification is available it is extremely difficult to obtain.[2]

In recognition that these requirements often seriously burden or completely destroy family unity between a United States citizen or permanent resident and his alien parent or child, Congress enacted Immigration and Nationality Act §§101(b)(1) and (2), 201(b), and 212(a)(14), which exclude a "child" of a United States citizen from numerical quota and labor certification requirements and a Western Hemisphere "parent" of a United States citizen or permanent resident "child" from the labor certification requirement. Included in the definition of "child" and "parent", and thus given a status which effectively permits them to live together in this country, are a legitimate and legitimated child and his parent, a stepchild and stepparent, and an illegitimate child in relationship to his mother and his unwed natural mother.

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1 The available quota numbers are assigned among seven preference categories. A non-preference immigrant can obtain an immigrant visa only when there is an available quota number not used within one of the seven preference categories. The illegitimate child of a United States citizen is considered a non-preference immigrant. INA §§202(a), 203 (8 U.S.C. §§1152(a), 1153).

2 A person seeking a labor certification must submit his job qualifications to an immigration or consular official. The Secretary of Labor has by regulation compiled a list of many jobs for which a labor certification will never be given. 29 CFR §§60.2(2), 60.7. Schedule B. The Secretary of Labor has also compiled a list of jobs -- certain occupations requiring an advanced degree in a medically related field or certain religious professions -- for which a labor certification may be granted if the alien establishes to the satisfaction of an immigration or consular official that he meets the qualifications. 29 CFR §§60.2(2), 60.7. Schedule A. Persons qualified for work in any other job category must have a specific job offer from an employer in the United States. 29 CFR 60.3(c) The Department of Labor must then gather the appropriate evidence and certify that the specific job which the alien will perform in the United States is in short supply and will not adversely affect the wages or working conditions of persons presently in the United States. INA §212(a)(14) (8 USC §1182 (a)(14)).

By operation of the challenged statutory provisions all such persons are presumed to always have the close family relationship which Congress sought to promote by affording them the "parent" - "child" status. Singularly excluded from the definition of "child" and "parent" are an illegitimate child in relationship to his father and his unwed natural father. By operation of the statutory provisions it is presumed that illegitimate children and their unwed natural fathers never have the close family ties which Congress sought to foster and preserve by enacting the statutory scheme. Thus, these provisions preclude unwed fathers and their illegitimate children from even the opportunity for individualized determinations of their "parent" - "child" status.

Set forth below are the facts of the appellants' cases, which dramatically illustrate the invidious discrimination and harsh inequities of the challenged provisions, and which the District Court found to be not in dispute.

Cleophus Warner, a citizen of the United States, is the father of Serge Patrick Warner, an alien, and has since his birth maintained a close relationship with his son. Since 1969, when Serge's mother informed Mr. Warner that she had married and did not want Serge to be returned to her, Serge has lived exclusively with his father. Mr. Warner's petition to classify his son as an "immediate relative" under the Immigration and Nationality Act was rejected on

March 2, 1972 on the grounds that it was mandatorily deniable because Serge Patrick Warner was not the legitimate or legitimated issue of Cleophus Warner.

The effect of the application of the challenged provisions is to deny Mr. Warner, a United States citizen, the care, companionship, custody and maintenance of his child in the United States. Mr. Warner will be separated from the child he has always supported and exclusively cared for since 1969. In turn, Serge Warner will be forced to return to a country where there is no one to care for him. Without "immediate relative" status, Serge Patrick Warner will be subject to a numerical quota and classified as a "non-preference" immigrant. (INA §§202(a), 203 (8 U.S.C. §§1152 (a), 1153)). A non-preference immigrant must not only meet a numerical quota, but must also satisfy a "labor certification" requirement. (INA §203(a)(8) (8 U.S.C. §1153 (a)(8)).

Mr. Warner can do nothing to achieve a status which would allow his son to live with him in the United States. Mr. Warner did everything possible to try to legitimate his child. He recognized paternity shortly after his son's birth and his name appears on the birth certificate. However, the only way he could legitimate his son is by marriage to the mother, who has married another man. Matter of Julianus, Board of Immigration Appeals, Interim Decision #2227 (Sept. 14, 1973); New York Domestic Relations Law §24 (McKinney 1964,

Supp. 1974).

Ramon Fiallo-Sone, an alien, has been the primary caretaker of his five-year old, out-of-wedlock, citizen son, Ramon Martin Fiallo, since the child's birth. A Form FS 497A was submitted on behalf of Ramon Fiallo-Sone to the United States Consulate in the Dominican Republic, the proper preliminary step for obtaining an immigrant visa and permanent resident status for a Western Hemisphere father of a United States citizen child under twenty-one. Consul Catherine Hurley rejected and returned the Form FS 497A in January, 1974. Ramon Martin Fiallo, a citizen of the United States, was thereby denied the statutory right of having his father, Ramon Fiallo-Sone, deemed eligible on the basis of their father-son relationship for an immigration visa and permanent resident status without a "labor certification," since Ramon Martin Fiallo was not legitimate. Mr. Fiallo has sought and been unable to obtain a labor certification in the past.

Trevor and Earl Wilson are permanent residents of the United States under twenty-one. They have always maintained a close relationship with their alien father, Arthur Wilson, to whom they were born out-of-wedlock. When their mother died in September of 1974 they sought to have their father enter the United States to live with and maintain them. Trevor Wilson, as the older child, submitted a Form I-550 to the Immigration and Naturalization Service, the proper

preliminary step for obtaining an immigrant visa and permanent residence for a parent of a United States permanent resident child under twenty-one. Trevor Wilson has received no response from the Immigration and Naturalization Service but it is inevitable that his father will not be exempted from a "labor certification" requirement since the Immigration and Nationality Act does not recognize an illegitimate child and his natural father as "child" and "parent".

The labor certification requirement will realistically be impossible for Mr. Wilson to meet, since the sole job for which he is qualified -- general handy man -- is one for which a labor certification will never be furnished. See 29 C.F.R. § 60.7 (Schedule B). The result is that the Wilson children, permanent residents of the United States, will never be reunited with their father in this country. The "parent-child" status can be obtained in no other way since Mr. Wilson cannot legitimate his children by marriage to their mother, who is dead.

Alleging jurisdiction under 8 U.S.C. §1329, 28 U.S.C. §1361, 28 U.S.C. §1331, and the Administrative Procedure Act (5 U.S.C. §701 et seq.), appellants instituted this class action [3] to declare unconstitutional, as violative of the First,

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[3] The class is defined as all United States citizen natural fathers and their alien children born out of wedlock and not legitimated who are excluded from the definition of "parent" and "child" under INA §§101(b)(1) and (2) (8 U.S.C. §§1101 (b)(1) and (2)) and thereby denied classification of the child as an "immediate relative" exempt from numerical quotas pursuant to INA §§201(a) and (b) (8 U.S.C. §§1151 (a) and (b)) and all United States citizen and permanent resident children born out of wedlock and not legitimated and their alien natural fathers who are excluded from the definition of "parent" and "child" under INA §§101(b)(1) and (2) (8 U.S.C. §§1101(b)(1) and (2)) and thereby denied exemption of the father from a "labor certification" requirement pursuant to INA §212 (a)(14) (8 U.S.C. §§1182(a)(14)).

Fifth, and Ninth Amendments to the United States Constitution, and to enjoin the operation and enforcement of Immigration and Nationality Act §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)), alone and as incorporated into Immigration and Nationality Act §§ 201(b) (8 U.S.C. §1151(b)) and 212(a)(14) (8 U.S.C. §1182(a)(14)), insofar as these provisions unconstitutionally denied appellants the status of "parent" and "child" and thereby denied them concomitant statutory rights solely because they are illegitimate children or their unwed natural fathers. In an opinion filed January 23, 1975, District Judge Weinstein found the constitutional questions presented by this action to be so substantial as to require the convening of a three-judge court pursuant to 28 U.S.C. §§2282, 2284. On November 28, 1975, a divided three-judge court filed opinions resulting in the denial of plaintiffs' motions for summary judgment, permanent injunction, and class action certification, the granting of judgment for the defendants, and dismissal of the action.

The three-judge court found that the plaintiffs had standing to maintain this action and that subject-matter jurisdiction over the action was conferred by 8 U.S.C. §1329. Although finding that "[w]ithout question, the policy behind the statutory enactments was a benevolent one" (Appendix A at 9), the majority held that the statute was not "patently unreasonable" (Appendix A at 8) in light of the objective -- not found by the majority to be the actual legislative purpose of Congress -- of minimizing the potential for spurious claims and facilitating administrative convenience.

In dissent, Judge Weinstein stated that "[s]o blatant a discrimination on the basis of gender and legitimacy is seldom found in modern statutes" (Appendix B at 9) and that "[w]here, as here, statutory invidious discrimination punishes American citizens by denying them familial association . . .

the statute is unconstitutional." (Appendix B at 3-4). Judge Weinstein specifically found that the "legislative history and the statutory scheme leave no doubt that the exclusive purpose of Congress was to maintain or reunite family units which include United States citizen or permanent resident members" (Appendix B at 10) and held that, in view of this Congressional purpose, there is no rational basis for the discrimination. (Appendix B at 11) Judge Weinstein further held that the statutory scheme was not rationally related to even the speculative purpose of preventing spurious claims and facilitating administrative convenience , and that the provisions created an unconstitutional conclusive presumption that unwed fathers never have close family ties with their illegitimate children, which presumption must constitutionally yield to more individualized determinations. (Appendix B at 19-22). The Court's judgment was entered on December 1, 1975. On December 31, 1975, appellants filed a notice of appeal to this Court.

THE QUESTION IS SUBSTANTIAL

This case presents substantial federal questions which concern the constitutionality of a federal statute of nationwide impact and which require plenary consideration by this Court. At stake for the appellant United States citizens and permanent residents is their fundamental interest in living together with their alien children or parents as a family unit in this country. The parent-child relationship

has been repeatedly recognized by this Court to be of fundamental constitutional stature.[4] The only way in which, realistically, United States citizens and permanent residents and their alien children or parents can be assured of securing a life together in this country is if they are granted the status of "parent" and "child" pursuant to Immigration and Nationality Act §101(b)(1) and (2) (8 U.S.C. §1101(b)(1) and (2)). Yet by their operation these statutory provisions single out unwed fathers and their illegitimate children for automatic exclusion from the fundamentally important "parent" - "child" status, solely because of the gender of the parent and the illegitimacy status of the child. Such invidious discrimination on the grounds of the immutable characteristics of sex or illegitimacy has been repeatedly condemned by this Court.[5] Here such sex and illegitimacy discrimination

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4 Weinberger v. Wiesenfeld, ___ U.S. ___, 43 L. Ed. 2d 514 (1975); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Levy v. Louisiana, 391 U.S. 68 (1968); May v. Anderson, 345 U.S. 528 (1953); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923).

5 Weinberger v. Wiesenfeld, supra; Stanton v. Stanton, ___U.S.___, 43 L. Ed. 2d 688(1975); Taylor v. Louisiana, ___ U.S. ___, 42 L. Ed. 2d 690 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). (Discrimination on the basis of sex).

Jiminez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md., 1972), aff'd. 409 U.S. 1069 (1972); Glona v. American Guaranty and Liability Insurance, 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968). (Discrimination on the basis of illegitimacy).

occur in combination and bear no rational relationship whatsoever to the sole Congressional purpose in enacting the statutory scheme to benefit United States citizens and permanent residents by exempting their alien parents, children, and spouses from restrictive immigration requirements and thereby making possible a family life together for them in this country. This Court has made it clear in its recent decisions that the validity under the Fifth Amendment's Due Process Clause of a federal statute must be measured against such an actual, and not some conjectured, purpose of Congress[6]. Further, the doublebarreled sex and illegitimacy discrimination worked by the challenged provisions is wholly irrational and arbitrary even if its constitutionality could be determined in light of the speculative and hypothetical Congressional purposes which were conjured up by the majority of the court below in sustaining the validity of the provisions. Finally, the harshness and invidiousness of the discrimination involved here is compounded by the statute's effective enactment of a conclusive irrebutable presumption that the close family ties, which it was the exclusive purpose of Congress to protect, are never present between unwed fathers and their illegitimate children, yet are always present for other categories of parents and children. Clearly, this statute's discrimination against

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6 Weinberger v. Wiesenfeld, ___ U.S. ___, 43 L. Ed. 2d. 514 (1975); Jiminez v. Weinberger, 417 U.S. 628 (1974); cf. Stanton v. Stanton, ___ U.S. ___, 43 L. Ed. 2d 688 (1975).

United States citizens and permanent residents on the combined grounds of sex and illegitimacy, discrimination which bears no rational, let alone compelling, relationship to the actual, or even any hypothetical, purpose of Congress, cannot be tolerated by this Court merely because it occurs in the field of immigration.

An examination of the legislative history of the challenged act and the statutory scheme clearly demonstrates that the exclusive purpose of Congress in enacting Immigration and Nationality Act §101(b)(1) and (2) was to maintain or re-unite family units which include United States citizen or permanent resident members whether or not the relationship is legitimate. Equally, it makes it clear that in enacting the statutory provisions Congress was not concerned with minimizing the risks of so-called "spurious" claims or of maximizing administrative convenience -- wholly hypothetical objectives which the majority below invoked to sustain the challenged provisions. The legislative history of the Immigration and Nationality Act discloses a continuing and "clearly expressed legislative intention to keep together the family unit wherever possible," whether or not the children in that unit were legitimate. House Report No. 1199, p.8, 85th Cong. 1st Sess; 1957 U.S. Code Congressional and Administrative News p. 2021.[7] That Congressional concern

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[7] See, for example, the House Reports for the 1952 and 1965 Acts. "H.R. 5676 implements the underlying intention of our immigration laws regarding the preservation of the family unit." House Report 1365 p. 29 (1952). "Reunification of families is emphasized as the foremost consideration." House Report No. 745, p. 12, 89 Cong. 1st Sess. (1965).

was not limited to "legitimate" family relationships is clearly shown in the legislative history of the 1957 Amendments. "[I]t is believed that there is need for the enactment of the instant section, in order to alleviate hardship and provide for a fair and humanitarian adjudication of immigration cases involving children born out of wedlock . . . The legislative history of the Immigration and Nationality Act clearly indicates that Congress intended to provide for a liberal treatment of children and was concerned with the problem of keeping families of United States citizens and immigrants united . . . Sympathetic and humane considerations dictate an interpretation which would not separate the child, whether legitimate or illegitimate, from its alien parent . . .." House Report No. 1199, 85th Cong. 1st Sess., pp. 7-8; 1957 U.S. Code Congressional and Administrative News, pp. 2020-2021. See Immigration Service v. Errico, 385 U.S. 214, 219-220 and n.9 (1966).[8] In light

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[8] See also the Congressional debate in both Houses in which the legislative purpose of family-unit maintainence or re-unification was repeatedly stressed:

> "This bill is praiseworthy in its fundamental purpose - to reunite families." Senator Pastore, Co-sponsor, 103 Cong. Rec. 15497.
>
> "My heart is glad for the thousands of American citizens who will now be able to be reunited with their families from whom they have been separated because of the working of our immigration law." Senator J.F. Kennedy, Co-sponsor, 103 Cong. Rec. 16719.
>
> "We find, then, that the fundamental principle behind the most important provisions of this bill is the reunification of families, a principle to which all must subscribe. In this bill we move forward to remove the personal tragedy of split and separated families. This is a family bill -- a bill for the family -- the American family." Congressman Rodino, House Judiciary Committee member, 103 Cong. Rec. 16307.

(footnote 8 cont. next page)

of the exclusive purpose of Congress to maintain or reunite family units, legitimate or otherwise, which include a United States citizen or permament resident member, there is not even a minimally rational basis for the statutory classification denying the parent-child status to unwed natural fathers and their illegitimate children while automatically granting it to persons in every other conceivable family relationship.

Even if the challenged discrimination could properly be judged in light of the wholly speculative objective of minimizing the risk of spurious claims and of facilitating administrative convenience, it would nonetheless be wholly irrational and unconstitutional.[9] The problems in proving the parenthood of an illegitimate child by his natural unwed father, and the methods of dealing with those problems, are the same as those for proving the parenthood of a legitimate or legitimated child or a stepchild or an illegitimate child

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(footnote 8 cont.)

> Colloquy between Congressmen Celler, Chairman of the Judiciary Committee and Congressman Rodino, member of the Committee:
>
> Rodino: "Is it not a fact that the fundamental principle behind the provisions and the most important provision of this bill is the reunification of families?"
> Celler: "That is correct." 103 Cong. Rec. 16301

9 Jiminez v. Weinberger, 417 U.S. 628 (1974) Cf. U.S. Dept. of Agr. v. Moreno, 413 U.S.528(1973; Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); Gomez v. Perez, 409 U.S. 535, 538 (1973); Glona v. American Guaranty and Liability Insurance Co., 391 U.S. 73, 76 (1968).

in relation to his mother.[10] If, for example, plaintiff Serge Warner were born in a country which allowed legitimation by parental recognition or if his father were married to a U.S.

---

10 Paternity and/or maternity must be claimed and proven in cases involving legitimate children, legitimated children, step-children and illegitimate children in relationship to their mothers. The burden of proof of any familial relationship is on the United States citizen or permanent resident and the alien relative. The relationship must be proven to the satisfaction of immigration and consular officials, and they may in all cases require birth certificates, marriage certificates, baptismal certificates, school records, census records, affidavits, letters, photographs, remittances, proof of custody, proof of support, a blood test, personal testimony, an investigation, and any other documents. 8 C.F.R. §204.2

Ignoring the fact that paternity must be proven in parent-child relationships recognized by the statute, the majority opinion below relied on alleged differences in proof of paternity versus maternity. This purported distinction does not, however, withstand close analysis. The majority assumed that the correct name of the mother will always appear on the birth certificate of a child and that there will always be such a certificate. That assumption ignores the fact that birth certificates can be forged as easily by a woman as by a man and that birth certificates, especially of children born in foreign countries, are not always available. As a practical matter the only way in which it would be easier to match up a particular mother and child than to match up a particular father and child would be through testimony by an individual present at the moment of birth asserting that a particular woman did in fact give birth to a particular child. Such proof would be extremely rare. In fact, the indicia of natural parentage used by the immigration and consular officials, including birth certificate, blood test, support and custody, are the same for both natural mothers and natural fathers.

Thus the invalidation of the challenged statutory provisions will leave immigration and consular officials free to determine the family relationship with respect to appellants and their class by the same means -- examination of documents and other indicia of the relationship like custody and support -- that are already employed by those officials to determine the family relationship with respect to persons presently given the "parent" - "child" status.

citizen and she petitioned for his entry as a step-child, immigration and consular authorities would have to make a determination of paternity and on the exact same evidence that is currently available to prove Mr. Warner's paternity. Andrade v. Esperdy, 270 F.Supp. 516 (S.D.N.Y., 1967); Nation v. Esperdy, 239 F. Supp. 531 (S.D.N.Y., 1965); Matter of Amado and Monteiro, 13 I & N Dec. 179 (B.I.A. 1969); Matter of Sinclair, Interim Dec. #2057 (B.I.A. 1970).

The total arbitrariness and complete irrationality of the statutory discrimination is highlighted by the step-parent provision of the challenged statutes. By that provision, a father is never considered the "parent" of his illegitimate child, but if the father marries, his wife may be his illegitimate child's "parent" and if his wife has an illegitimate child he may be her child's "parent". Nation v. Esperdy, 239 F. Supp. 531 (S.D.N.Y., 1965); Matter of The, 11 I & N Dec. 449 (1965).

The classification in question is especially pernicious because while it automatically and irrationally deems that each of the covered family relationships constitutes a viable family unit, it at the same time automatically concludes that unwed natural fathers and their illegitimate children never constitute a viable family unit.[11] It makes

[11] The sociological and psychological data presented to and recognized by the Court below, as well as the appellants' own factual circumstances, demonstrate that unwed natural fathers and their illegitimate children in fact often do have close family ties. (Appendix A at 7-8; Appendix B at 16-18)

that presumption conclusive and irrebutable by failing to give unwed natural fathers and their illegitimate children even the opportunity to show that parent and child do in fact constitute a viable family unit. Turner v. Department of Employment Security, ___ U.S. ___, 46 L. Ed. 2d 181 (1975); Weinberger v. Wiesenfeld, ___ U.S. ___, 43 L. Ed. 2d 514 (1975); Jiminez v. Weinberger, 417 U.S. 628 (1974); Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974); United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973); United States Department of Agriculture v. Murry, 413 U.S. 508 (1973); Stanley v. Illinois, 405 U.S. 645 (1972). It is especially irrational to assume, as the challenged provisions do, that a viable family unit always exists between a divorced father and his legitimate child over whom he may not even have custody, or between a stepfather and his wife's child, but never exists with respect to an unwed natural father and his illegitimate child. It is equally arbitrary to distinguish between unwed natural fathers, on the one hand, and unwed natural mothers, unwed parents of legitimated children, and unwed natural fathers whose United States citizen wives are stepmothers, on the other.

The inescapable conclusion that the challenged statutory provisions are patently unconstitutional is unaffected by the scope of Congressional power in the immigration field. This Court has left no doubt that Congressional power over immigration is circumscribed by the Constitution.

In its recent constitutional pronouncements in the immigration field, the Court has emphatically held that "it is clear, of course, that no Act of Congress can authorize a violation of the Constitution" and that in the immigration area, as in any other, "a resolute loyalty to constitutional safeguards" is required.[12] Almeida-Sanchez v. United States, 413 U.S. 266, 272 and 273, and 275 (Mr. Justice Powell, concurring) (1973); United States v. Brignoni-Ponce, 422 U.S. 873 (1975). In sharp contrast to the instant case, cases which sustained broad Congressional power in the immigration area all involved foreign policy considerations or the clearly expressed Congressional choice to exclude or expel a certain group of aliens specifically and clearly perceived to pose a grave danger to the national security or general welfare of this country.[13]

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[12] Like the plaintiff in Wong Yang Sung v. McGrath, 339 U.S. 33 (1949), the appellants in this case seek a procedural opportunity to be heard, here with respect to the existence of the very factor -- the existence of a family relationship -- which is central to the statutory scheme and which is merely presumed for all other family relationships.

[13] E.g. Chae Chan Ping v. United States, 130 U.S. 584 (1889) (abrogation of a treaty with a foreign government); Harisiades v. Shaughnessy 342 U.S. 580 (1951) (Communists); Shaughnessy v. U.S. ex rel Mezei, 345 U.S. 206 (1953) (aliens who are threats to national security); Kleindienst v. Mandel, 408 U.S. 580 (1972) (Communists).

Clearly, the challenged provisions in no way involve Congress' determination of the course of this country's relations with foreign governments. Equally self-evident is the conspicuous absence of an express Congressional concern that illegitimate children or their natural fathers constitute a threat to the national security or welfare of the United States. Finally, this case uniquely involves immigration provisions which are designed to afford statutory rights to United States citizens and permanent residents.

CONCLUSION

For the foregoing reasons, the questions presented by this appeal are substantial and merit plenary consideration of the Court. Probable jurisdiction should thus be noted and the case set for oral argument.

Dated: New York, New York
February 27, 1976

Respectfully submitted,

John E. Kirklin

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Best Available Original Copy
Follows. For Printed Opinion
See 406 F. Supp. 162.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RAMON MARTIN FIALLO, An infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, An infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,	:	74 C 1083
Plaintiffs,	:	
-against-	:	
EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, JR., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,	:	OPINION AND ORDER
Defendants.	:	

APPEARANCES:

JANET CALVO, Esq., New York, N.Y.
(Kalman Finkel, Morton B. Dicker,
John E. Kirklin, Anita Fisher Barett,
Esqs., The Legal Aid Society)
for Plaintiffs.

DOUGLAS J. KRAMER, Esq., Assistant U.S. Attorney, Brooklyn, New York (David G. Trager, United States Attorney, Eastern District of New York) for Defendants.

BEFORE: MOORE, Circuit Judge, WEINSTEIN and BRAMWELL, District Judges.

MOORE, Circuit Judge:

This is an action challenging the constitutionality of two classifications of aliens established by Congress as part of a comprehensive scheme for the admission of aliens into the United States contained in the Immigration and Nationality Act (the "Act"), Title 8 U.S.C. §1101 et seq. Plaintiffs specifically challenge the Act's definition of "parent" and "child" insofar as it excludes the relationship between unwed, biological fathers and their illegitimate children[1/]. The effect of the exclusion is to subject the aliens in question to restrictive numerical quotas and labor certification requirements which are waived for individuals who qualify as parents or children, within the meaning of the Act, of American citizens and permanent residents.[2/] Plaintiffs are three sets of unwed, biological fathers and their illegitimate offspring. Both the aliens excluded by this section of the Act and the American citizens or permanent residents who are these aliens' illegitimate children or biological fathers have joined as plaintiffs in this suit; their claim is that the statutory classification is unconstitutional on its face since unwed biological fathers are excluded while unwed biological mothers are not.

A three-judge court was ordered convened, and plaintiffs have moved this Court for certification as a class action, summary judgment, and a permanent injunction. For the reasons which follow, those motions are denied, and judgment is entered for the defendant. The facts are not in dispute, and may be summarized briefly.

Ramon Fiallo, an infant and an American citizen by birth, applied - through application submitted on his behalf by his mother - to the United States Consul in the Dominican Republic to have his alien father officially declared to be his parent under the immigration laws, so that the latter might remain permanently in the United States. Ramon Fiallo's petition was rejected, the Consul stating that Fiallo senior could not be declared the parent of an American citizen since his child was illegitimate. At present, both parents are living together in this country with their child; although the father could qualify as a parent if he legitimated his son, he and the boy's mother do not wish to marry.

Cleophus Warner, a naturalized American citizen, attempted to have his illegitimate son Serge, a citizen of the French West Indies, officially declared to be his child within the meaning of the Act by filing a petition with immigration authorities in New York, so that the boy might

remain permanently with his father in this country. The petition was rejected since the boy was neither the father's legitimate nor legitimated offspring, and hence he could not meet the Act's definition of a child.

Trevor and Arthur Wilson are two brothers under twenty-one years of age who are permanent residents of the United States. After the death of their biological mother they sought to have their father, a citizen of Jamaica, officially classified as their parent so that he might qualify for permanent residency in this country. It is not clear whether their petition has already been denied, but denial is certain since the boys were never legitimated and hence their father cannot qualify as a parent under the Act.

The alien fathers and son in this action believe that their only realistic avenue of admittance to this country on a permanent basis is through classification as the parent or child of an American citizen or permanent resident. Fiallo senior has sought a labor certificate unsuccessfully in the past; Wilson senior alleges that the only job for which he is qualified - that of general handyman - is one for which the required certificate is not granted.

Subject matter jurisdiction is conferred on this Court by section 279 of the Act, Title 8 U.S.C. §1329.

A threshold question is presented with regard to Fiallo's standing to maintain this action. The administrative

decision on which Fiallo bases this suit is the denial of his petition by the United States Consul at Santo Domingo. Decisions of consuls granting or denying a visa have been held to be immune from judicial review. See, e.g., Loza-Bedoya v. INS, 410 F.2d 343 (10th Cir. 1975). We note, however, that the petition in question here did not constitute an application for a visa, but was a preliminary declaration of immigrant status. We will not extend consular non-reviewability, insofar as that rule has been recognized, beyond the actual grant or denial of a visa. This is predicated upon our reluctance to insulate entirely the actions of any public official from judicial scrutiny, and thereby foreclose a group of plaintiffs from seeking relief in the courts. Plaintiff Fiallo, therefore, is not barred from bringing this action.

Turning to the merits, we begin with the proposition that Congress' power to make rules for the admission and expulsion of aliens is exceptionally broad.

> This Court without exception has sustained Congress' plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden. Over no conceivable subject is the legislative power . . . more complete than it is over the admission of aliens.
> Kliendienst v. Mandel, 408 U.S. 753, 766, 92 S.Ct. 2576, 2583, 33 L.Ed. 2d 633 (1972) (quotation marks and citations omitted)

The limits to the exercise of this power are few, for an alien has no constitutional right to enter or remain in this country, Kliendienst v. Mandel, supra. Moreover, he may be denied entrance on grounds which would be constitutionally suspect or impermissible in the context of domestic policy, namely, race[3/], physical condition,[4/] political beliefs,[5/] sexual proclivities,[6/] age,[7/] and national origin.[8/]

In regulating the admission of aliens who are the spouses, parents, and children of American citizens and permanent residents, Congress has chosen to specify the kind of relationships which are, for purposes of the immigration laws, embraced within those terms. This is a perfectly proper exercise of the Congressional responsibility to admit into this country those individuals who will be desirable additions to our populace. This includes individuals who will respect our system of government[9/] and who will be useful additions to our labor force,[10/] as well as those whose lives reflect personal standards of conduct important to our society's sense of morality. And while the Congress' view about what kind of marital or parental relation should be encouraged in this country may differ from the individual views held by the members of the courts, it is not for the judiciary to usurp the legislative function and replace the Congressional standards with its own.

A number of courts have ruled on the question of whether, in the immigration field, Congress may constitutionally apply its own standards with respect to the status of familial relations, and we note that this power has consistently been upheld. In United States v. Diogo, 320 F.2d 898 (2d Cir. 1963), this Court held that a marriage valid under state law need not be recognized as valid under the immigration laws.

> Of course Congress may adopt a federal standard of bona fides for the limited purpose of denying immigration priorities to persons whose marriages do not meet the standard. That standard, embodied in the Congressional understanding of the terms "marriage" and "spouse" as those terms appear in the immigration statutes is, of course, the relevant standard to apply in exclusion or deportation proceedings brought under the statutory provisions appropriate. 320 F.2d at 905.

In Faustino v. INS, 432 F.2d 429 (2d Cir. 1970), cert. denied, 401 U.S. 921, 91 S.Ct. 909, 27 L.Ed. 2d 824 (1971), we held that it was not unconstitutional for Congress to permit citizen children over the age of twenty-one to bring their alien parents into this country without regard to numerical quotas, but to deny that same privilege to citizen children under that age. Accord, Perdido v. INS, 420 F.2d 1179 (5th Cir. 1969). And in an analagous situation the District of Columbia Circuit upheld the application of one aspect of the Act's restrictive definition of child to the provision of the Act granting

priority status to the sons and daughters of American citizens;[11] the effect of the holding was to deny the status of child, and hence the consequent statutory benefits, to aliens who were adopted by American citizens after their fourteenth birthdays.[12] Nazareno v. Attorney General of the United States, supra.

There is no doubt that Congress can establish classifications which result in the granting of benefits to one group of individuals, and their denial to another. Unless the immigration laws in question are wholly devoid of any conceivable rational purpose,[13] or are fundamentally aimed at achieving a goal unrelated to the regulation of immigration,[14] they are not unconstitutional encroachments on the right to equal protection of the laws.

At the request of the Court the Legal Aid Society representing the plaintiffs submitted a most able and exhaustive post-trial memorandum demonstrating via statistical tables and many treatises its thesis that the "courts are giving increasing legal recognition to the reality that unwed fathers, like mothers, have close ties to their illegitimate children." (Post-Argument Memorandum, p. 17). From these statistics and extensive bibliography counsel draw the conclusion that "the evidence leaves no rational underpinning for discriminatory treatment of unwed natural fathers and their illegitimate children, and

leaves no doubt of the patent unconstitutionality of the severe and extreme form of discrimination effectuated by the statutory provisions challenged herein." (Id. p. 21). These conclusions, plaintiffs say (Id. p. 1), demonstrate "the utter irrationality of the unwarranted conclusive presumptions effectuated by the challenged provisions. . ."

However, in view of the need to establish administrative procedures abroad which can process immigration applications efficiently, avoid extremely difficult problems of investigation and proof, and minimize the potential for sham claims, we cannot say that the legislative decision to exclude unwed, biological fathers and their illegitimate children from the statutory definitions of parent and child is patently unreasonable. Cf. Faustino v. INS, supra. For example, while the names of biological mothers routinely appear on such documents as birth certificates, this may not be the case where unmarried fathers have not acknowledged paternity officially at about the time of birth. Although such evidence would not necessarily be conclusive of one's status as a parent, nevertheless we perceive that it might be more difficult for an unrelated adult to pose as a child's mother than a child's father, where the birth certificate contains a definite name and identification of the mother only.

As a matter of law, therefore, the challenged immigration provisions are not so arbitrary or capricious as to be unconstitutional; accordingly, we conclude that plaintiffs' provocative statistics and ably documented argument, which certainly would merit Congress' attention, cannot be given weight here, lest this Court engage in the kind of policy-making activity which is properly the province of the legislative branch and not the judiciary.

Plaintiffs urge that Congress' primary purpose in exempting the parents and children of American citizens and permanent residents from quota limitations and labor certification requirements was to enable families to be together in the United States. Without question, the policy behind the statutory enactments was a benevolent one; however, we cannot accept plaintiffs' unspoken assumption that they, and not Congress, should determine who constitutes the "family" which shall be allowed to enter this country on a priority basis. The statutory language is quite clear in its exclusion of unwed fathers and their illegitimate children; the fact that Congress focused upon the type of family which it determined should have the right to emigrate en masse to our shores[15/] indicates that it may well have decided that, on balance, unwed fathers would not have such relations with their illegitimate children as would justify their being given this special exemption from the normal

immigration requirements which apply to all other individuals seeking visas for permanent residency.

Even if it be assumed arguendo that biological, unwed fathers should under all circumstances be accorded the rights of parents, plaintiffs' constitutional claim cannot prevail. The possibility of joining one's closest family in the United States is a privilege granted by statute, not a right given by the Constitution.

> There can be no doubt but that [the appellants] as unadmitted and non-resident aliens have no constitutional right to enter and remain in this country. It is equally clear that their wives as resident aliens have no constitutional right to keep them here on the theory that the integrity of the family is protected by equal protection principles.
> Noel v. Chapman, 508 F.2d 1023, 1027 (2d Cir. 1975).

The same rule has been applied by this Court when the individual seeking to challenge an alien's expulsion was the alien's United States citizen-child. Enciso-Cardozo v. INS, 504 F.2d 1252, 1253 (2d Cir. 1974); cf. Faustino v. INS, supra. As we recognized in Noel v. Chapman, supra at 1027-8, the burden of separation from one's kin which occurs when an alien relative is properly excludable under our immigration laws and the American citizen or resident determines not to leave this country in order to be with the alien, is not the equivalent of the statutory destruction of the marriage or family relationship. Certainly a dif-

ficult choice is involved, but it is not one which is forbidden by the Constitution.

Plaintiffs' final argument is that the operation of the Act's definition of parent and child works a constitutionally impermissible hardship on them. While we are not unmindful of plaintiffs' plight, we have held in the past that such incidental impact on the family as the operation of the immigration laws may have is not violative of the Constitution. Noel v. Chapman, supra; Enciso-Cardozo v. INS, supra; accord, Robles v. INS., 485 F.2d 100 (10th Cir. 1973); Silverman v. Rogers, 437 F.2d 102 (1st Cir. 1970), Perdido v. INS, 420 F.2d 1179 (5th Cir. 1969). The law is at times painful to some, but it cannot on that basis alone be automatically invalidated as to all.

Consideration of the class action issue is unnecessary in the light of our decision.

Leonard P. Moore
U.S.C.J.

Henry Bramwell
U.S.D.J.

F O O T N O T E S

1

The relevant section is 1101(b)(1)(2), which reads:

(1) The term "child" means an unmarried person under twenty-one years of age who is--

(A) a legitimate child; or

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred; or

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent or parents at the time of such legitimation.

(D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;

(E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

(F) a child, under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care which will be provided the child if admitted to the United States and who has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and his spouse who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse who have complied with the preadoption requirements,

if any, of the child's proposed residence: Provided, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

(2) The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection.

2

8 U.S.C. §1151(b), 8 U.S.C. §1182(a)(14).

3

Dunn v. INS, 499 F.2d 856, 858 (9th Cir. 1974).

4

U.S. v. Esperdy, 277 F.2d 537, 539 (2d Cir. 1960).

5

Kliendienst v. Mandel, supra.

6

Boutilier v. INS, 387 U.S. 118, 87 S.Ct. 1563, 18 L.Ed. 2d 661 (1967).

7

Nazareno v. Attorney General of the United States, 512 F.2d 936 (D.C. Cir. 1975).

8

Faustino v. INS, 432 F.2d 429, 431 (2d Cir. 1970), cert. denied, 401 U.S. 921, 91 S.Ct. 909, 27 L.Ed. 2d 824 (1971); Hital v. INS, 343 F.2d 466, 467 (2d Cir. 1965), cert. denied, 382 U.S. 816, 86 S.Ct. 36, 15 L.Ed. 2d 63 (1965.

9

Kliendeinst v. Mandel, supra.

10

See, e.g., Buckley v. Gibney, 332 F.Supp. 791 (S.D.N.Y. 197.)

11

8 U.S.C. §115 (a)(1)

12

This is one of the several types of individuals whom we might commonly call children, but who are excluded from the Act's definition of that term. Others excluded are married children, children over twenty-one years of age, stepchildren who were over eighteen when the marriage creating their status occurred, children who were legitimated after they were eighteen. Similarly, the mothers and fathers of these individuals are not accorded the status of parents within the meaning of the Act.

13

This Court has held that there is no need to apply the test of compell[illegible] state interest in immigration cases, since alienage is not a suspect classification for purposes of legislation regulating the admission and expulsion of aliens. Noel v. Chapman, 508 F.2d 1023, 1028 (2d Cir. 1975).

14

In this regard we note that where the Congressional purpose of any law regarding aliens is not to regulate immigration but to invidiously discriminate against American citizens, permanent residents, or already-admitted aliens, that law cannot - in contrast to the one under consideration here - withstand constitutional scrutiny. See How Sun Wong v. Hampto 500 F.2d 1031, 1036 (9th Cir. 1974); Ramos v. United States Civil Service Commission, 376 F.Supp. 361, 366 (D. Puerto Rico 1974); cf. Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 91 L.Ed. 2d 534 (1971).

15

Counsel for the Government persuasively suggested at oral argument that plaintiffs' position could have sobering consequences if adopted by immigration officials: an unwed mother living here could bring to the United States all of her illegitimate children, each of whom could bring over his or her biological father; each father could then bring over all of the children he has ever fathered, and there-

after each of those children could bring over his or her mother, who could then bring over all of her illegitimate children, etc., etc., etc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- x

RAMON MARTIN FIALLO, an infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, an infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

- against -

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, Jr., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Defendants.

- -x

74 C 1083

DISSENTING OPINION

WEINSTEIN, District Judge (Dissenting):

I. Issues

The constitutionality of the definitions of "parent" and "child" in the Immigration and Naturalization Laws is challenged. Section 101(b)(1) and (2) of the Immigration and Nationality Act (Act), Title 8 U.S.C. § 1101(b)(1) and (2) (1970). Unlike mothers and their illegitimate children fathers, and their illegitimate children, are excluded from the definition of "parent" and "child". They are therefore ineligible for certain exemptions given citizens' relatives who are trying to enter the country: citizen fathers can not have their migrating illegitimate children exempted from numerical quotas and labor certification requirements as their "immediate relatives"; citizen and permanent resident illegitimate children can not have their migrating fathers exempted from the labor certification requirement. Insofar as pertinent, the definitional provision reads:

> "(1) The term 'child' means an unmarried person under twenty-one years of age who is--
>
> (A) a legitimate child; or
>
> * * *
>
> (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;
>
> * * *
>
> "(2) The terms 'parent', 'father', or 'mother' mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection."

8 U.S.C. § 1101(b) (1970).

The questions presented are (1) whether a statut making it more difficult for a parent and his child -- one of whom is a citizen or permanent resident -- to live together in this country solely because of the sex of the parent and the illegitimacy of the child is valid under th Fifth Amendment; and (2) whether a federal court is withou power to declare such a statute invalid because it is a pa of the immigration laws. The answers should be no. The Constitutional road to equality of the sexes is open to me as well as women. Each of these plaintiffs is being depri of a critical part of his "life . . . without due process law." U. S. Const. Fifth Amend.; cf. id. Fourteenth Amend ("equal protection of the laws").

Legal discrimination between men and women or l timates and illegitimates with no rational basis is no longer tolerated. Where, as here, statutory invidious discrimination punishes American citizens by denying tha

familial association, one of the most precious attributes of humanity, the courts should say what is plain: the statute is unconstitutional. The wrong to parent and to child is not reduced by characterizing the one as a "biological father", without regard for his progeny. Such disdain for filial affection is incompatible with a Constitution embodying the highest ideals of a civilized nation such as ours.

II. Facts

Plaintiffs Ramon Fiallo and Ramon Fiallo-Sone, son and father

Ramon Fiallo is a United States citizen, born in New York City in 1971. Although his father, Mr. Fiallo-Sone, was not married to his mother, his father's name appears on his birth certificate and his father has nurtured him since his birth. An American consul has informed Mr. Fiallo-Sone that he is not eligible for an immigrant visa or permanent residence status without a labor certificate, and that while the labor certificate requirement is waived in the case of fathers of citizen children, the waiver is only available if the child is legitimate issue. A foreign mother of an illegitimate citizen would have obtained the waiver.

Plaintiffs Serge Warner and Cleophus Warner, son and father

Cleophus Warner, a naturalized citizen, is the unwed father of Serge Warner, who was born in the French West Indies in 1960. Mr. Warner's name appears on Serge's birth

certificate, he registered as Serge's father shortly after Serge's birth, and he has acknowledged paternity. Mr. Warner has supported his son since the child's birth. In 1969 Serge, in accord with his parents' and his own desires, entered the United States to live with his father. Father and son took steps to obtain an immigrant visa and permanent residence status for Serge in 1972. The Immigration and Naturalization laws allow citizen parents to bring alien children into the United States as "immediate relatives" without regard to the applicable numerical limitation on immigrants. Mr. Warner's petition was denied on the ground that Serge was not his legitimate issue as required by statute. Had the petition been by a mother who was a naturalized citizen, or had the child been legitimate, the petition would have been granted.

Plaintiffs Trevor and Earl Wilson and Arthur Wilson, sons and father

Trevor and Earl Wilson, who are now permanent residents of the United States, were born in Jamaica in 1957 and 1959 respectively. Arthur Wilson acknowledges the boys as his illegitimate sons. He lived with them and supported them until 1968, at which time they moved to New York City

with their mother. From 1968 until 1974 Mr. Wilson maintained his relationship with his sons by visits and correspondence. He also continued to support them financially. After their mother died in 1974, the two boys asked their father to come to the United States to live with them. But Mr. Wilson was only able to stay for as long as an emergency visa allowed. Since his children are illegitimate, Mr. Wilson is unable to settle in the country without a labor certification. Were a mother in Mr. Wilson's position, or were the children legitimate, the parent would have been able to enter the country without a labor certification.

III. Law

The position of these three families illustrates the severe effects on American citizens and permanent residents from the Act's discrimination between male and female parents and between legitimate and illegitimate children in its definitions of parent and child. The government does not contend that the relationship of parent to child does not exist or that a strong emotional bond between the father and child is lacking in any of these cases. Its position is that the statute compels the discrimination.

This statute, defendant insists, is not subject to judicial review. Characterizing the classification as one of aliens for the purpose of their exclusion from the country, it contends that Congressional power to exclude aliens is unfettered. See, e.g., Chae Chan Ping v. United States, 130 U.S. 581, 9 S.Ct. 623, 32 L.Ed. 1068 (1889); Faustino v. Immigration and Naturalization Service, 432 F.2d 429, 431 (2d Cir. 1970) (Per Curiam), cert. denied, 401 U.S. 921, 91 S.Ct. 909, 27 L.Ed.2d 824 (1971).

But this is not a simple case of classifying aliens for the purpose of preferring some over others for entry. Rather, Congress has hinged immigrants' access to this country on their relationship to citizens and permanent residents. The question thus becomes whether a Congressional classification of citizens and permanent residents which severely disadvantages them may escape traditional constitutional scrutiny merely because it is set in alienage legislation.

If the classification were based on race, rather than gender or legitimacy, the court's power would be no different. Were Blacks, for example, excluded from the list of those American citizens who could bring in their

relatives without regard to quotas, no court would let the statute stand. The Constitution, and in particular, the Fifth Amendment, protects citizens from abusive or discriminatory government action. Packaging a discriminatory classification of citizens in alienage legislation can not insulate it from judicial scrutiny.

There is ample Supreme Court precedent for intervention when enforcement of the Act burdens citizens' constitutional rights. United States v. Brignoni-Ponce, U.S. , 95 Sup.Ct.2574, L.Ed.2d (1975); Almeida-Sanchez v. United States, 413 U.S. 266, 273 n.5, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973). See also, Burrafato v. United States Dept. of State, F.2d (2d Cir. 1975) (dicta). The Court has recognized procedural due process and Fourth Amendment limitations on the government's exclusion and expulsion of aliens. See, e.g., Wong Yang Sung v. McGrath, 339 U.S. 33, 49-50, 70 S.Ct. 445, 454, 94 L.Ed. 615 (1950); Kwock Jan Fat v. White, 253 U.S. 454, 459, 464, 40 S.Ct. 566, 568, 570, 64 L.Ed. 1010 (1920); Kaoru Yamataya v. Fisher, 189 U.S. 86, 100, 23 S.Ct. 611, 614, 47 L.Ed. 721 (1903): cf. Lennon v. INS F.2d (2d Cir. 1975).

When courts have been faced with challenges to other sections of the Act which classify aliens in terms of their relationship to citizens, they have not shrunk from traditional equal protection analysis. See Perdido v. Immigration and Naturalization Service, 420 F.2d 1179, 1181 (5th Cir. 1969); Faustino v. Immigration & Naturalization Service, 302 F.Supp. 212, 215 (S.D.N.Y. 1969), aff'd, 432 F.2d 429 (2d Cir. 1970), cert. denied, 461 U.S. 921, 91 S.Ct. 909, 27 L.Ed.2d 824 (1971). Cf. Noel v. Chapman, 508 F.2d 1023, 1026-9 (1975).

So blatant a discrimination on the basis of gender and legitimacy is seldom found in modern statutes. Illegitimacy as a basis for denial of rights available to legitimates has been repeatedly struck down as invidious and lacking in rational basis. See, e.g., Jiminez v. Weinberger, 417 U.S. 628, 632, 94 S.Ct. 2496, 2499, 41 L.Ed.2d 363 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619, 620-621, 93 S.Ct. 1700, 1701, 36 L.Ed.2d 543 (1973) (Per Curiam); Gomez v. Perez, 409 U.S. 535, 538, 93 S.Ct. 872, 875, 35 L.Ed.2d 56 (1973) (Per Curiam); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 175-1[illegible] 92 S.Ct. 1400, 1406-1407, 31 L.Ed.2d 768 (1972); Glona v.

American Guaranty and Liability Insurance, 391 U.S. 73, 76, 88 S.Ct. 1515, 1517, 20 L.Ed.2d 441 (1968); Levy v. Louisiana, 391 U.S. 68, 70-72, 88 S.Ct. 1509, 1510-1511, 20 L.Ed.2d 436 (1968); Tanner v. Weinberger, F.2d (6th Cir. 1975). Gender classifications have also been treated as invalid. See, e.g., Turner v. Dept. of Employment Security, U.S. , Sup.Ct. , L.Ed.2d (1975); Weinberger v. Wiesenfeld, U.S. , 95 S.Ct. 1225, 43 L.Ed 2d 514 (1975); Stanton v. Stanton, U.S. , 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975); Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); Ginsburg, Gender and the Constitution, 44 U.Cinn. L. Rev. 1 (1975).

The legislative history and the statutory scheme leave no doubt that the exclusive purpose of Congress was to maintain or reunite family units which include United States citizen or permanent resident members. Not a shred of evidence has been produced to support the government's claim that the statutory purpose was to prevent spurious paternity claims by unwed natural fathers. As one of the provision's co-sponsors put it: "This bill is praiseworthy in its fundamental purpose --

to reunite families." 103 Cong. Rec. 15497 (1957) (remarks of Senator Pastore). See also, H.R.Rep. No. 1199, 85th Cong., 1st Sess. 7-8 (1957); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 29 (1952); 1957 U.S. Code Cong. & Ad. News 2020-2021; 103 Cong. Rec. 16719 (1957) (remarks of Senator Kennedy); 103 Cong. Rec. 16307 (1957) (remarks of Representative Rodino); Immigration Service v. Errico, 385 U.S. 214, 219-220 and n. 9, 87 S.Ct. 473, 477-478, 17 L.Ed.2d 318 (1966); Nation v. Espe 239 F.Supp. 531, 534-535 (S.D.N.Y.1965). The courts must disti the general legislative purpose from the legislative history, particularly where it supports a reasonable non-sexist interpretation. Weinberger v. Wiesenfeld, U.S. , , 95 S.Ct. 1225, 1233-35, 43 L.Ed.2d 514 (1975). In view of the Congressional purpose to reunite families, th is no rational basis for the statutory classification denying the parent-child status to unwed natural fathers and their illegitimate children while automatically granting it to persons in other family relationships.

Even if Congress were motivated by a desire to discriminate against men and illegitimates in a way harmful to American citizens, the statute could not stand.

It is firmly established that a natural parent, whether father or mother, and a child, whether legitimate o not, have fundamental, constitutionally protected interests in mutual companionship and a life together.

> "The rights to conceive and to raise one's children have been deemed 'essential,' Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923), 'basic civil rights of man,' Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942), and '[r]ights far more precious . . . than property rights,' May v. Anderson, 345 U.S. 528, 533, 73 S.Ct. 840, 843, 97 L.Ed. 1221 (1953)."

Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972). See also, Weinberger v. Salfi, U.S. , 95 S.Ct. 2457, L.Ed.2d (1975); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 169, 92 S.Ct. 1400, 1403, 31 L.Ed.2d 768 (1972); Levy v. Louisiana, 391 U. 68, 71, 88 S.Ct. 1509, 1511, 20 L.Ed.2d 436 (1968).

> "It is no less important for a child to be cared for by its . . . parent when that parent is male rather than female. And a father, no less than a mother, has a

> constitutionally protected right o the "companionship, care, custody, a management' of 'the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection.' Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972)."

Weinberger v. Wiesenfeld, U.S. , , 95 S.Ct. 1225, 1235, 43 L.Ed.2d 514 (1975).

Courts now recognize that unwed fathers, like mothers, often have strong ties of affection to their illegitimate children and desire a continuing relationship with them. See, e.g., Miller v. Miller, 504 F.2d 1067 (9th Cir. 1974) (Per Curiam) (statute permitting adoption without notic to natural father of illegitimate unconstitutional); People ex rel. Slawek v. Covenant Children's Home, 52 Ill.2d 20, 284 N.E.2d 291 (1972) (statute precluding father of illegitimate from asserting right to child and denying custody unconstitutional); In Re Mark T., 8 Mich. App. 122, 154 N.W.2d 27, 35 (Ct. App. 1967) (custody of illegitimate child awarded to father after mother's release of child for adoption) and cases cited 154 N.W.2d at 33 n. 7, 154 N.W.2d at 35 n. 13; R. v. F., 113 N.J.Super. 396, 273 A.2d 808 (Juv. & Dom.

Rel. Ct. 1971) (denying father and his natural child of right to see each other deprives them of equal protection); Application of Juan R., (N.Y.Fam.Ct.), in N.Y.L.J., Oct. 28 1975, at 1, col. 3 (putative father who has established paternity may bring action to acquire visiting right: without litigating custodial issues); Stone v. Chip, 68 Mis: 2d 134, 326 N.Y.S.2d 520 (Fam.Ct. 1971) (criticizing rule that mother should have child absent proof she is unfi: Conley v. Johnson, 24 N.C.App. 122, 210 S.E.2d 88 (Ct.App. 1974) (court may order visitation rights for father of illegitimate despite mother's objection); Hammack v. Wise, 211 S.E.2d 118, 121 (W. Va. 1975) (father awarded custody of illegitimate child); State ex rel. Lewis v. Lutheran Social Services, 59 Wisc. 2d 1, 207 N. W. 2d 826 (1973) (father of illegitimate

must be given a hearing on termination of his parental rights); K. Davidson, R. Ginsburg and H. Kay, "Text Note: Illegitimacy and Sex Based Discrimination," Sex Based Discrimination 309-329 (1974); Note, The Emerging Constitu: al Protection of the Putative Father's Parental Rights, 70 Mich. L. Rev. 1581 (1972).

State legislatures are systematically revising laws in order to expand the parental rights of unwed fathers. See, e.g., Fla. Stat. Ann. § 63.062 (1974 Hawaii Rev. Laws § 578-2 (Supp. 1974); S.H. Ill. Ann. Stat ch. 4, §§ 9.1-1E, 9.1-8, 9.1-12a (1975); Burns Ind. Stat. Ann. § 31-3-1-6 (Supp. 1975); Me. Rev. Stat. Ann. § 532 (Supp. 1975); Mich. Comp. Laws Ann. § 710.3a (Supp. 1973); Minn. Stat. Ann. §§ 259.24, 259.26, 259.261 (Supp. 1975); N.D. C.C.A. § 14-15-20 (1971); R.I. Gen. Laws § 15-7-5 Supp. 1974); Utah Code Ann. § 78-30-4 (Supp. 1975); Va. C § 63.1-225 (Supp. 1975); Wash. Rev. Code Ann. §§ 26.32.03 26.32.085, 26.24.190, 26.28.110 (Supp. 1974); Wisc. Stat. Ann.ch. 263, §§ 48.02 (ii), 48.42, 48.02, and 48.425 (Sup 1975).

This clear trend is consonant with national policy recognized by Congress in its adoption of the Equal Rights Amendment and in its enactment of a series of other statutes designed to overcome outmoded concepts of sex discrimination. See, e.g., Proposed Constitutional Amendment, S.J. Res. 9, 92d Cong., 1st Sess., 118 Cong. R 9568 (1972), H.R. J. Res. 208, 92d Cong., 1st Sess., 117 Cong.Rec.35782 (1971); Civil Rights Act of 1964, Title VII 42 USC § 2000(e)-5 (1974), Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1965).

The fact that Congress has not yet had the oppo tunity to winnow through the enormous federal statutory materials to carry out its clear present policy gives adde force to the argument that the vestigial remainder of such discrimination embodied in the Act should be closely revie by the courts.

Social science literature and empirical studies illustrate why courts, as well as legislatures, no longer allow legislative exclusion of fathers of illegitimates fr statutory benefits. Such discrimination is based on an archaic and overbroad stereotype of unwed fathers. Most

pregnancies result from exclusive long-term re.tionships between the father and mother. M. Sauber and E. Rubinstein, Experiences of the Unwed Mother as a Parent 27 (1965); Herzog, "Some Notes About Unmarried Fathers," 1966 Child Welfare 194; Pope, "Unwed Mother and Their Sex Partners," 29 J. of Marriage & the Family, 555, 558 (1967). Many fathers not only continue the relationship with the mother after the child's birth, Sauber and Rubinstein, supra, at 53, but also demonstrate genuine interest in and concern for their children. R. Pannor, F. Massarik, and B. Evans, The Unmarried Father 92 (1971); Chaskel, "Changing Patterns in Services for Unmarried Parents," 49 Social Casework 3, 10 (1968); Wessel, "A Physician Looks at Services for Unmarried Parents," 49 Social Casework 11, 12 (1968).

Even those fathers not living with their children assume many of the functions of fatherhood vital to the well-being of children, including financial and emotional support. One statistical study found that between 59% to 83% of these fathers contribute money for their child's expenses and approximately 70% visit their children. Ewer, 1971 Maternal and Child Health Service, Project H-214-2, Characteristics of AAPP Unwed Fathers -- A Descriptive Study 2, Table 33

(unpublished, Div. of Research, Maternal and Child Health Service, HSMHA).

An even more striking indication of the strengt of the fathers' parental commitment is that an increasing number of illegitimate children are living with their fathe In 1970 13.9% of the children under eighteen living with single parents, that is, parents who have never been marrie lived with their single fathers, as compared to 9.2% in 19 U.S. Bur. of the Census, 1 U.S. Census of the Population 1970, Characteristics of the Population, Pt. 1, U.S. Summar -- Sec. 2, Table 206 (1973); id., U.S. Census of the Popula tion 1960, Table 185 (1963).

The three plaintiff families are good examples of the variety of situations in which strong familial bonds tie illegitimate children to their fathers. Ramon Fiallo's parents, although unmarried, have functioned as a family since the child's birth. Cleophus Warner and the Wilson bo have been supported financially by their fathers since birt They now depend upon their fathers to be their sole parents because of a mother's choice to live without the child in one case and the mother's death in the other.

The challenged provisions, by excluding only fathers and their illegitimate children from statutory benefits, are based upon an irrebuttable presumption that fathers do not have close family ties with their illegitimat offspring, a presumption belied by the statistical evidence, sociological evaluation of family life, and the facts in the three cases before us. Such a presumption without basis in fact is invalid. See, e.g., Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); United States Dept. of Agriculture v. Murry, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed.2d 767 (1973); Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973). Cf. Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974).

Whatever assumed basis there may once have been for such sexist presumptions no longer exists. Rationality must be viewed in the light of current knowledge. See Turner v. United States, 396 U.S. 398, 90 S.Ct. 642, 24 L.Ed 610 (1970).

Even if we accepted the government's contention that the natural fathers of illegitimate children were

singled out by Congress to prevent spurious claims, the statutory scheme is not rationally related to that end. See Jiminez v. Weinberger, 417 U.S. 628, 634-6, 94 S.Ct.2496 2500-01, 41 L.Ed.2d 363 (1974), where the Court invalidated provisions of the Social Security Act denying children's insurance benefits to a subclass of illegitimate children because the structure of the statute was not reasonably related to the purported purpose, prevention of spurious cl

Paternity or maternity must be claimed and prove in cases involving legitimate children, legitimated children step-children and illegitimate children to the satisfaction immigration and consular officials. The burden of proof of any familial relationship is on the United States citize or permanent resident and the alien relative. Immigration authorities may require birth certificates, marriage certifi cates, baptismal certificates, school records, census record affidavits, letters, photographs, remittances, proof of cust proof of support, a blood test, personal testimony, and oth evidence. 8 C.F.R. § 204.2 (1975). The potential for spurious claims is as great for those included in the statutes' definitions of parent and child as for illegitima

children and their fathers. Women claiming to be mothers of illegitimate children and men claiming to be fathers of legitimated, legitimate, or illegitimate children in a step-child situation, and their respective children, would have as much difficulty or ease in presenting fraudulent proof as would a man claiming to be the father of an illegitimate child and his child.

And yet, quota restrictions are waived in the case of a step-child or legitimated child if paternity is proven, but a conclusive statutory presumption denies any opportunity of proof in the case of an illegitimate child. A conclusive presumption supposedly established to prevent spurious claims can not be upheld when the potential for fraud is similar for the excluded group and for groups receiving the statutory benefits. Jiminez v. Weinberger, 417 U.S. 628, 636-637, 94 S.Ct. 2496, 2501-02, 41 L.Ed. 363 (1974). Cf. U. S. Dept. of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct.2821, 37 L.Ed.2d 782 (1973); Vlandis v. Kline, 412 U.S. 441, 453-4, 93 S.Ct. 2230, 2237, 37 L.Ed.2d 63 (1973); Gomez v. Perez, 409 U.S. 535, 538, 93 S.Ct. 872, 875, 35 L.Ed.2d 56 (1973); Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); Glona v. American Guaranty & Liability Insurance Co.,

391 U.S. 73, 76, 88 S.Ct. 1515, 1517, 20 L.Ed. d 441 (1968). This rigid presumption must be replaced by "more individualized means" of determining the family relationship. Turner v. Dept. of Employment Security, U.S. , , S.Ct. , L.Ed.2d (1975).

Practically speaking, the government's contention that the restrictive definition of parent is necessary to prevent spurious claims is nothing more than a plea on behalf of administrative convenience. But it has been clear for some time now that a scheme built upon administrative convenience cannot stand when invidious discrimination results. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 690, 93 S.Ct. 1764, 1772, 36 L.Ed.2d 583 (1973).

IV. Conclusion

Plaintiffs' request for summary judgment in their favor should be granted.

Dated: Brooklyn, New York
November 28 1975.

Jack B. Weinstein
U. S. D. J.

APPENDIX C

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ JAN 23 1975 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RAMON MARTIN FIALLO, et al.,

Plaintiffs,

- against -

WILLIAM SAXBE, et al.,

Defendants.

74 C 1083

MEMORANDUM AND ORDER

APPEARANCES:

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(MORTON B. DICKER, ANNETTE ELSTEIN, JULIUS BIERVLIET, JOHN E. KIRKLIN, and ANITA FISHER BARRETT, of the Legal Aid Society, on the briefs)

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By: DOUGLAS J. KRAMER, Esq.
Assistant United States Attorney
Attorneys for Defendants

WEINSTEIN, D.J.

Plaintiffs are non-citizen fathers of illegitimate citizen or resident children and non-citizen illegitimate children of citizen fathers. They challenge the constitutionality of the definitions of "parent" and "child" favoring mothers over fathers found in the Immigration and Naturalization Laws, 8 U.S.C. § 1101(b)(1) and (2), and seek a three-judge court.

28 U.S.C. § 2282. Discriminations between males and females are coming under increased scrutiny. Legal distinctions once accepted are no longer constitutional in view of rapidly changing mores. See, e.g., Taylor v. Louisiana, U.S. , , Sup.Ct. , L.Ed.2d (No. 73-5744) (January 21, 1975) (separate rules on jury qualification for men and women no longer valid). For the reasons indicated below, a three-judge court must consider the issues.

Insofar as pertinent, the statute reads:

> "(1) The term 'child' means an unmarried person under twenty-one years of age who is--
>
> (A) a legitimate child; or
>
> ***
>
> (D) an illegitimate child, by, through whom, or on whose behalf a status, privilege, or benefit is sought by virtue of the relationship of the child to its natural mother;
>
> ***
>
> (2) The terms 'parent', 'father', or 'mother' mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection."

I. PLAINTIFFS' CONTENTIONS

Immigrants are admitted to the United States on a strict numerical quota system, which makes admission difficult, but "immediate relatives" of United States citizens, including children and parents are admitted without regard to the quota system. 8 U.S.C. § 1151(a)(b). However, fathers of illegitimate children are excluded from the definition of "parent" and illegitimate children of citizen fathers are excluded from the definition of "child". Thus if an illegitimate child is a native or naturalized United States citizen, the child's natural father cannot be admitted to the United States except via the quota system. And if the father of the illegitimate child is a naturalized or native United States citizen, the child cannot be admitted, except through the quota system. The law allows the mothers of illegitimate citizen children and the illegitimate children of citizen mothers to be admitted without regard to the quota system.

Plaintiffs claim violations of the Fifth Amendment equal protection and due process principles. They state that the law discriminates without justification on the basis of sex and illegitimacy, and establishes an invalid conclusive

presumption that there are no psychological and economic ties between illegitimate children and their fathers.

II. STANDARD FOR CONVENING THREE-JUDGE COURT

A three-judge court must be convened if the claim meets the slight burden of substantiality described in Goosby v. Osser, 409 U.S. 512, 518, 93 S.Ct. 854, 858-59 (1973):

> "Constitutional insubstantiality for this purpose has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.' The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' " [Citations omitted]

See, also, Hagans v. Lavine, 415 U.S. 528, 537-38, 94 S.Ct. 1372, 1379. (1974).

While this court must, in the interests of judicial economy, carefully scrutinize a request to convene a three-judge court (Bynum v. Connecticut Commission on Forfeited

Rights, 410 F.2d 173 (2d Cir. 1969)), the most recent case in this circuit repeats the Goosby formulation, and reiterates that a "fairly low standard applies." Finnerty v. Cowen, No. 74-1668, Slip Op. 848 (2d Cir. Dec. 16, 1974).

III. APPLICABILITY OF THE "POLITICAL QUESTION" DOCTRINE

The government argues that there is no basis for a three-judge court. It contends that the classification of aliens for the purpose of exclusion is a "political question" which courts have traditionally avoided. The courts in the past have adhered to such a policy, beginning with Choe Chan Ping v. United States, (The Chinese Exclusion Case), 130 U.S. 581, 609, 9 S.Ct. 623 (1889). In Lew Moon Sing v. United States, 158 U.S. 538, 547, 15 S.Ct. 967, 970 (1895), for example, the court concluded that:

> "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

This position was most recently restated by the Supreme Court in Kleindienst v. Mandel, 408 U.S. 757, 92 S.Ct. 2576 (1972), a case which challenged on First Amendment grounds the Attorney General's failure to admit an advocate of Communism. See, also, Harisiades v. Shaughnessy, 342 U.S. 580, 588-89, 72 S.Ct. 512 (1952) (upheld deportation of Communist Party members); Galvan v. Press, 347 U.S. 522, 74 S.Ct. 737 (1954) (deportation case); Hitai v. Immigration and Naturalization Service, 343 F.2d 466, 467 (2d Cir.), cert. denied, 382 U.S. 816 (1965) (upheld special quota for Japanese immigrants); Faustino v. Immigration and Naturalization Service, 302 F.Supp. 212 (1969), aff'd. 432 F.2d 429 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971) (court refused to convene a three-judge court because equal protection arguments concerning immigration classifications based upon age of child were insubstantial).

But these cases must be read in the light of the Supreme Court's most recent pronouncement on the reviewability of immigration laws in Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535 (1973). The court found unconstitutional a provision in the immigration laws allowing warrantless border searches. In the face of a dissent which asserted, citing Mandel, supra, that congressional opinion as to the

constitutionality of a statute must be accepted when that statute deals with the exclusion of aliens, the majority held that "no Act of Congress can authorize a violation of the Constitution," and that in the immigration field, as in others, "a resolute loyalty to constitutional safeguards" is required. Almeida-Sanchez, supra, 413 U.S. at 272, 273, 93 S.Ct. at 2539, 2540. While the fact pattern in Almeida-Sanchez is very different from the case before this court, it is also true that none of the cases cited by the government compares to the fact pattern here.

Plaintiffs further argue that none of the cases cited by the government supports the precise proposition that the constitutionality of an immigration statute relating to the exclusion of aliens is immune from judicial review, where, as here, no foreign policy determination, incapable of being reviewed by judicially discoverable and manageable standards, is involved. Plaintiffs also assert that Congress itself in drafting the act contemplated judicial intervention to the extent necessary to bring it into accord with the Constitution. House Report No. 1365, 82d Cong., 2d Sess., at 6 (1952) ("the right to exclude or expel all aliens or any class of aliens . . . to be regulated . . . by act of Congress . . .

except so far as the judicial department . . . is required by the paramount law of the Constitution to intervene"). Plaintiffs claim, too, that the case here is distinguishable from cases cited by the government, since it involves not merely the rights of aliens, to which a "political question" doctrine might be applied, but also the rights of United States citizens and permanent residents, although their alien relatives also benefit.

Thus, without making any comments on the merits, Almeida-Sanchez, supra, and the plaintiffs' arguments stated above make plaintiffs' claims "at least arguable" (Finnerty v. Cowen, No. 74-1668, Slip Op. 849 (2d Cir. Dec. 16, 1974)). On this line of attack the government fails to meet the heavy burden necessary for it to forestall a three-judge court.

IV. APPLICABILITY OF "CONSULAR NON-REVIEWABILITY" DOCTRINE.

The government, in its initial brief, argued that the courts could not review the classifications involved in this case under the doctrine of consular non-reviewability. United States ex rel. Ulrich v. Kellogg, 30 F.2d 984 (D.C.Cir.), cert. denied, 279 U.S. 868, 49 S.Ct. 482 (1929); Toza-Bedoya v. Immigration and Naturalization Service, 410 F.2d 342 (9th Cir. 1969); Ticea-Gomez v. Pilliod, 193 F.Supp. 577, 582 (N.D. Ill. 1960). Plaintiffs respond, however, that consuls are not acting within any regulatory or statutory discretion with respect to plaintiffs here, since the statute requires them to exclude the plaintiffs. Thus, plaintiffs argue, there is no proper question of discretion here which would invoke the doctrine. Plaintiffs' position is at least arguable, and so the government fails to preclude a three-judge court review by this tack.

V. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The government argues that plaintiffs' administrative remedies have not been exhausted and thus the case is not ripe for adjudication. Plaintiffs respond that many years would have to pass before the plaintiff children reached the age they could apply for admission under the quota system, and also that a similar period of years would have to pass before plaintiff fathers would be reached under the quota. Such delays, say plaintiffs, would deprive the children of paternal nurture, since in each case here the father has the basic responsibility for the child. Plaintiffs also allege that the plaintiff fathers would not normally be admitted at all through the quota system as they lack the skills necessary for the labor certificate that must be obtained for entry through the quota

system. Thus, plaintiffs assert that except in the most abstract sense their case is fully ripe. Plaintiffs' position is at least arguable.

VI. RATIONALITY OF THE CLASSIFICATION

The government's final argument is that the classification challenged by plaintiffs is neither arbitrary nor unreasonable. The government states that classification based on illegitimacy is not per se unconstitutional. Labine v. Vincent, 401 U.S. at 536, 91 S.Ct. at 1019 (1971).

The government further states that the classification may have resulted from a possible congressional concern with the problem of fraud attendant upon a determination of paternity between fathers and their illegitimate children. The government argues that a classification designed to prevent spurious claims has a rational basis. Stanton v. Weinberger, No. 73-1959, Slip Op. (10th Cir. Sept. 3, 1974). The point obviously has merit since parturition is normally more easily proven than insemination. But whether the discrimination need be as broad as that in the statute may require further inquiry.

In any event, there is at least some basis for plaintiffs' response that the law discriminates without either compelling or rational justification against unwed fathers and their natural children on the basis of sex and illegitimacy. See, in reference to rights to raise illegitimate children: May v. Anderson, 345 U.S. 528, 533,

73 S.Ct. 840, 843 (1953); Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113 (1942); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625 (1923); in reference to rights of parents to custody and care of children: Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212 (1972); Griswold v. Connecticut, 381 U.S. 479, 496, 85 S.Ct. 1678, 1688 (1965) (Goldberg, J. concurring); Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442 (1944); in reference to extension of parental rights to care for child to family not legitimated by marriage: Weber v. Aetna Cas. and Surety Co., 406 U.S. 164, 169, 92 S.Ct. 1400, 1403 (1972); Stanley v. Illinois, 405 U.S. at 651, 92 S.Ct. at 1212 (1972); Levy v. Louisiana, 391 U.S. 68, 71, 88 S.Ct. 1509, 1511 (1968); in reference to discrimination based on legitimacy: Jimenez v. Weinberger, U.S. , 94 S.Ct. 2496 (1974); New Jersey Welfare Rights Organization v. Cahill, 416 U.S. 619, 93 S.Ct. 1700 (1973); Gomez v. Perez, 409 U.S. 535, 93 S.Ct. 872 (1973); Weber v. Aetna Cas. and Surety Co., 406 U.S. 164, 92 S.Ct. 1400 (1972); Glona v. Amer. Guaranty and Liability Ins., 391 U.S. 73, 88 S.Ct. 1515 (1968); Levy V. Louisiana, 391 U.S. 68, 88 S.Ct. 1509 (1968); Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110 (1942); Griffin v. Richardson, 346 F.Supp. 1226 (D. Md.), aff'd, 409 U.S. 1069, 93 S.Ct. 689 (1972); Davis v. Richardson,

342 F.Supp. 588 (D.Conn.), aff'd, 409 U.S. 1069, S.Ct. (1972); concerning discrimination on the basis of sex: Taylor v. Louisiana, U.S. , Sup.Ct. , L.Ed.2d ; Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764 (1973); Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971).

Plaintiffs contend that the law establishes an unwarranted conclusive presumption of the absence of psychological and economic ties between unwed fathers and their illegitimate children. See, Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208 (1972) (concerning the presumption that all unwed fathers are neglectful parents); Cleveland Board of Education v. La Fleur, 414 U.S. 632, 644, 94 S.Ct. 791, 798 (1974) ("'permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments'").

Plaintiffs' position, in view of the case law, is at least arguable.

VII. CONCLUSION

Under the standard established in Goosby v. Osser, 407 U.S. 512, 518, 93 S.Ct. 858-59 (1973), plaintiffs' case cannot be considered wholly insubstantial, obviously frivolous,

and obviously without merit. Accordingly, a three-judge court must be convened. Plaintiffs' motion to certify the case as a class action is deferred for consideration by the three-judge court.

SO ORDERED.

Dated: Brooklyn, New York
January 23, 1975.

Jack B. Weinstein
U. S. D. J.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

RAMON MARTIN FIALLO, an infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SOSA; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, an infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

- against -

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD F. CHAPMAN, JR., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE WILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; EDWARD MAGNUSZEWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. BURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Defendants.

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This cause having come on to be heard before a three-judge court, the Honorable Leonard P. Moore, United States Circuit Judge, the Honorable Jack B. Weinstein, United States District Judge, and the Honorable Henry Bramwell, United States District Judge, presiding, and an opinion and order of the Honorable Leonard P. Moore, United States Circuit Judge, and the Honorable Henry Bramwell, United States District Judge, having been filed on November 28, 1975, denying the plaintiffs' motions for certification as a class action, summary judgment, and a permanent injunction, and granting judgment for the defendant, and a dissenting opinion of the Honorable Jack B. Weinstein, United States District Judge, having been filed on November 28, 1975, it is

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ORDERED and ADJUDGED that the plaintiffs take nothing of the defendants and that the action is dismissed.

Dated: Brooklyn, New York
December 1, 1975

Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 C 1083

RAMON MARTIN FIALLO, An infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, An infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD F CHAPMAN, Jr., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service for New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that RAMON MARTIN FIALLO, an infant by his mother, CELIA FRANCISCA MICHAEL RODRIGUEZ, RAMON AUGUSTO RAFAEL FIALLO-SONE, CLEOPHUS RUPERT WARNER, SERGE PATRICK WARNER, an infant by his father CLEOPHUS RUPERT WARNER, TREVOR ASTON WILSON and EARL ANTONIO WILSON, infants by their Aunt LENA HUDSON and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated, the plaintiff-appellants in the above captioned action, hereby appeal to the Supreme Court of the United States from each and every part of the final order and judgment of the three judge court in the Eastern District of New York entered on December 1, 1975 denying plaintiffs motions for summary judgment, permanent injunction and class action certification, granting judgment for defendants and dismissing the action.

This appeal is taken pursuant to 28 U.S.C. §1253.

DATED: NEW YORK, NEW YORK
December 31 1975.

KALMAN FINKEL
Attorney-in-Charge
The Legal Aid Society
Civil Division

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Attorneys for Plaintiff-Appellants

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x 74 C 1083

RAMON MARTIN FIALLO, An infant by his Mother, CELIA FRANCISCA MICHAEL RODRIGUEZ and RAMON AUGUSTO RAFAEL FIALLO-SONE; CLEOPHUS RUPERT WARNER and SERGE PATRICK WARNER, An infant by his father, CLEOPHUS RUPERT WARNER; TREVOR ASTON WILSON and EARL ANTONIO WILSON, Infants by their aunt and next friend LENA HUDSON, and ARTHUR CECIL WILSON, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

EDWARD H. LEVI, individually and as Attorney General of the United States; LEONARD E. CHAPMAN, Jr., individually and as Commissioner of the Immigration and Naturalization Service; MAURICE KILEY, individually and as District Director of the Immigration and Naturalization Service of New York City; HENRY KISSINGER, individually and as Secretary of State of the United States; LEONARD WALENTYNOWICZ, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; JULIO ARIAS, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; CATHERINE M. HURLEY, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic,

Defendants.

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AFFIDAVIT OF SERVICE BY MAIL

JANET CALVO, being duly sworn deposes and says:

1. I am an attorney in the office of the Legal Aid Society (Kalman Finkel, Morton B. Dicker) attorney of record for Ramon Martin Fiallo, an infant by his Mother, Celia Francisca Michael Rodriguez, and Ramon Augusto Rafael Fiallo-Sone; Cleophus Rupert Warner and Serge Patrick Warner, an infant by his father, Cleophus Rupert Warner; Trevor Aston Wilson and Earl Antonio Wilson, Infants by their aunt and next friend Lena Hudson, and Arthur Cecil Wilson, on behalf of themselves and all other persons similarly situated, plaintiff-appellants, herein.

2. I served a copy of the foregoing Notice of Appeal to the Supreme Court on Edward H. Levi, individually and as Attorney General of the United States; Leonard E. Chapman, Jr., individually and as Commissioner of the Immigration and Naturalization Service; Maurice Kiley, individually and as District Director of the Immigration and Naturalization Service for New York City; Henry Kissinger, individually and as Secretary of State of the United States; Leonard Walentynowicz, individually and as Administrator of the Bureau of Security and Consular Affairs, Department of State; Julio Arias, individually and as Director of Visa Office, Bureau of Security and Consular Affairs, Department of State; Catherine M. Hurley, individually and as Consul of the United States of America, Santo Domingo, Dominican Republic, the parties thereto as follows; by depositing a copy of the Notice of Appeal to the Supreme Court in a United States mail box with first class pre paid postage addressed to attorney for defendants, David Trager, United States Attorney, Eastern District of New York 225 Cadman Plaza East,

Brooklyn, New York 11201, Attention Douglas Kramer and Solicitor General Department of Justice, Washington, D.C.20530.

JANET M. CALVO

Sworn to before me this
31st day of December 1975.

Notary Public, State of New York
Qualified in Kings County
Commission Expires March 30, 1977

APPENDIX F

STATUTES INVOLVED

Immigration and Nationality Act §101 (b)(1)(2), (8 U.S.C. §1101 (b)(1)(2)), (66 Stat. 171 (1952) as amended by 71 Stat. 639 (1957) as amended by 89 Stat. 824 (1975)), provides:

(1) The term "child"means an unmarried person under twenty-one years of age who is --

(A) a legitimate child; or

(B) a stepchild, whether or not born out of wedlock, provided the child had not reached the age eighteen years at the time the marriage creating the status of the stepchild occurred; or

(C) a child legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in legal custody of the legitimating parent or parents at the time of such legitimation.

(D) an illegitimate child, by, through whom, or on whose behalf a status, privilege or benefit is sought by virtue of the relationship of the child to its natural mother;

(E) a child adopted while under the age of fourteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter.

(F) a child under the age of fourteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence: Provided, That the Attorney General is satisfied that

proper care will be furnished the child if admitted to the United States: Provided further, That no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status und er this Act.

(2) The terms "parent", "father", or "mother" mean a parent, father, or mother only where the relationship exists by reason of any of the circumstances set forth in subdivision (1) of this subsection.

Immigration and Nationality Act §201(b), (8 U.S.C. §1151(b)), (79 Stat. 911 (1965)), provides:

The "immediate relatives" referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States: Provided, That in the case of parents, such citizen must be at least twenty-one years of age. The immediate relatives specified in this subsection who are otherwise qualified for admission as immigrants, shall be admitted as such, without regard to the numerical limitations in this chapter.

Immigration and Nationality Act §212(a)(14), (8 U.S.C. §1182(a)(14)), (79 Stat. 917-918 (1965)), provides:

Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A), (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203(a)(3) and (6) of this title, and to nonpreference immigrant aliens described in section 203(a)(8).*

* The United States Code citations for Immigration and Nationality Act §§101(a)(27)(A), 203(a)(3), (6), (8) are 8 U.S.C. §§1101(a)(27)(A), 1153(a)(3), (6), (8), respectively.